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11 Attorneys for Defendant Younique, LLC

12 UNITED STATES DISTRICT COURT
13
14 CENTRAL DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

15 MEGAN SCHMITT, DEANA
16 REILLY, CAROL ORLOWSKY, and
STEPHANIE MILLER BRUN,
17 individually and on behalf of
themselves and all others similarly
18 situated,

19 Plaintiffs,

20 v.

21 YOUNIQUE, LLC

22 Defendant.

Case No. 8:17-cv-01397-JVS-JDE

**DEFENDANT'S MOTION TO
DISMISS FIRST AMENDED
COMPLAINT**

*[Notice of Motion and Proposed Order
filed concurrently herewith]*

Hearing:

Date: December 4, 2017

Time: 1:30 p.m.

The Hon. James V. Selna
Santa Ana, Courtroom 10C

Complaint filed: August 14, 2017

Trial Date: None Set

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I.**
3 **INTRODUCTION**

4 By their First Amended Class Action Complaint ("FAC"), Plaintiffs attack a
5 mascara product for failing to be "natural," even though the mascara's packaging
6 makes plain that the product contains synthetic ingredients. The product in
7 question, Younique Moodstruck 3D Fiber Lashes ("the Product") consists of two
8 components. The first is a transplanting gel, which is not described as natural. In
9 fact, the ingredients list states that the gel contains a known synthetic, nylon. The
10 second component is a tube of fibers. Both components of the product are used
11 together to enhance the appearance of eyelashes. From 2012 to 2015, the fibers
12 were described on the Product label as "natural." Seizing on the "natural" language,
13 (and ignoring the rest of the packaging) Plaintiffs assert that Defendant Younique
14 misled consumers about the Product's ingredients.

15 The four Plaintiffs are residents of California, Florida, Ohio, and Tennessee.
16 Between them, they bring 18 claims for relief, arising under the laws of their home
17 states, federal law, and the laws of the other 46 states and the District of Columbia.
18 These claims mostly arise from alleged breaches of warranty (express and implied)
19 and from alleged violations of state consumer protection statutes.

20 By this motion, Defendant seeks to eliminate the claims that lack legal merit,
21 and clarify the claims and issues in the case.

22 Plaintiffs fail to state a claim under the Magnuson Moss Warranty Act
23 ("MMWA") because "natural" is a product description that does not come within the
24 scope of actionable warranties under the MMWA.

25 Plaintiffs' breach of the implied warranty of merchantability claims fail
26 because, regardless of the fibers' ingredients, the Product – a mascara – was still
27 usable as a mascara. Plaintiffs have not alleged that they were not able to use the
28 Product as mascara (in fact, they make no allegations relating to their actual use of

1 the Product at all). Similarly, Plaintiffs fail to state sufficient facts for their claims
 2 for breach of the implied warranty of fitness for a particular purpose because the
 3 FAC as a whole establishes that Plaintiffs purchased the Product for its ordinary
 4 purpose – for use as a mascara.

5 The UCL claim should be dismissed because only equitable relief is available
 6 under the UCL. Plaintiffs do not request any equitable relief in their prayer for
 7 relief (FAC, p. 37-38), instead seeking only monetary damages. Plaintiffs lack
 8 standing to seek such relief because they have not alleged that they lack adequate
 9 remedies at law.

10 Plaintiffs purport to bring claims under the laws of all other states, but lack
 11 standing to do so. Plaintiffs are residents of California, Florida, Ohio, and
 12 Tennessee, who have brought claims under the laws of those states. They allege no
 13 connection to the laws of the 46 other states to allow them to bring claims under
 14 those states' laws.

15 Finally, Plaintiffs Reilly (Florida) and Brun (Ohio) failed to allege that they
 16 met the prefiling requirements before suing under their respective state's laws.
 17 There is no allegation that Plaintiff Reilly gave notice as required by Florida law
 18 before bringing the breach of express warranty and breach of the implied warranty
 19 of fitness for a particular purpose claims. As for Brun, special notice requirements
 20 must be met before a class action claim can be brought under Ohio's Consumer
 21 Sales Practices Act ("OCSPA"). However, Brun failed to allege any facts
 22 establishing her satisfaction of this prerequisite to suit.

23 **II.** 24 **PROCEDURAL HISTORY**

25 The original complaint filed by Plaintiff Schmitt, a California resident,
 26 asserted nine claims: (1) Violation of California's Unfair Competition Law, Cal.
 27 Bus. & Prof. Code § 17200 *et seq.* ("UCL"); (2) Violation of California's Consumer
 28 Legal Remedies Act, Cal. Civ. Code § 1750 *et seq.* ("CLRA"); (3) Violation of State

1 Consumer Protection Statutes (41 jurisdictions, including the District of Columbia);
 2 (4) Breach of Express Warranty Under the Song-Beverly Warranty Act; (5) Breach
 3 of Implied Warranty Under the Song-Beverly Warranty Act; (6) Breach of Express
 4 Warranty Laws of Other States (50 jurisdictions); (7) Violation of the Magnuson-
 5 Moss Warranty Act, 15 U.S.C. § 2301 *et seq.*; (8) Breach of Implied Warranty of
 6 Merchantability Laws of Other States; and (9) Breach of Implied Warranty of
 7 Fitness for a Particular Purpose Laws of Other States. These claims were brought
 8 against Younique LLC, and Coty, Inc., and they included claims brought under the
 9 laws of all 50 states.

10 In compliance with the local rules, Defendants met and conferred with
 11 Plaintiff Schmitt regarding all of the claims raised by the initial complaint. Plaintiff
 12 agreed to amend, ultimately filing the instant FAC with its 18 claims for relief
 13 against Younique only. (Coty, Inc. is no longer a defendant.) The FAC also adds
 14 three new Plaintiffs (residents of Florida, Ohio, and Tennessee), another plaintiff's
 15 law firm, and maintains many of the original claims, including claims arising under
 16 the laws of states for which there is no named plaintiff.

17 The 18 claims in the FAC arise under federal, California, Florida, Ohio, and
 18 Tennessee law, as well as the laws of all other 46 states. Again in compliance with
 19 the local rules, Defendant's counsel met and conferred with Plaintiffs' counsel
 20 regarding this motion. Plaintiffs' counsel were unwilling to further amend the
 21 complaint in response to the issues raised by Defendant's counsel, but stated that
 22 they may amend after the Court rules, and that such amendment may include adding
 23 additional named plaintiffs.

24 **III.** 25 **SUMMARY OF CLAIMS SUBJECT TO THIS MOTION**

26 Given the number of claims appearing in the FAC, Defendant offers the Court
 27 the following summary chart of Plaintiffs' claims and the claims in this motion:
 28

Plaintiff Bringing Claim	Claim Number	Claim Theory	Law Under Which Claim Arises	Defendant Seeking Dismissal?
All	1	Magnuson Moss Warranty Act	Federal	Yes
Schmitt	2	UCL	California	Yes
Schmitt	3	CLRA	California	Yes
Schmitt	4	Express Warranty	California	No
Reilly	5	Unfair And Deceptive Trade Practices Act	Florida	No
Reilly	6	Express Warranty	Florida	Yes
Reilly	7	Implied Warranty of Merchantability	Florida	Yes
Brun	8	Consumer Sales Practices Act	Ohio	Yes
Brun	9	Deceptive Trade Practices Act	Ohio	No
Brun	10	Express Warranty	Ohio	No
Brun	11	Implied Warranty	Ohio	Yes
Orlowsky	12	Consumer Protection Act	Tennessee	Yes
Orlowsky	13	Express Warranty	Tennessee	No
Orlowsky	14	Implied Warranty	Tennessee	Yes
All	15	Consumer Protection Statutes	All other states	Yes
All	16	Express Warranty	All other states	Yes
All	17	Implied Warranty Merchantability	All other states	Yes
All	18	Implied Warranty Fitness Particular Purpose	All other states	Yes

IV.
ALLEGATIONS OF THE FIRST AMENDED COMPLAINT

Younique's Product (a mascara) is designed to enhance the appearance of eyelashes. (FAC, ¶¶ 1, 3.) It consists of two components: a tube of transplanting gel and a tube of fibers. (FAC, ¶¶ 3, 8 (images).) To properly apply the Product, the mascara user first opens a tube of transplanting gel and (using the provided wand) "sweeps" this onto the eyelashes. (FAC, ¶ 8.) The user then opens the

1 separate tube of fibers. The fibers adhere to the provided mascara wand, and the
 2 user sweeps these onto the eyelashes. (*Id.*) The transplanting gel holds the fibers in
 3 place, giving the lashes an enhanced look.

4 From 2012 until 2015, the Product's packaging stated that the fiber
 5 component of the mascara was "natural" and consisted of "100% Natural Green Tea
 6 Fibers". (FAC, ¶¶ 3, 4, 8.) The Product's packaging also stated that the
 7 transplanting gel contained nylon. (FAC, ¶ 8, second image.)

8 Plaintiff Schmitt is an individual consumer who, at all relevant times, was a
 9 citizen of California. (FAC, ¶ 24.)¹ It is unclear from the FAC when she purchased
 10 the Product, how many times she purchased the Product, or if she actually used it.
 11 Plaintiffs Reilly, Brun, and Orlowsky are also individual consumers who, at all
 12 relevant times, were citizens of Florida, Ohio, or Tennessee, respectively. (FAC, ¶¶
 13 28, 32, 36.) Plaintiffs allege that the representations appearing on the packaging
 14 were important to them. (FAC, ¶¶ 24, 28, 32, 36.) Plaintiffs allege that they believe
 15 "nylon is a synthetic ingredient." (FAC, ¶¶ 26, 30, 34, 38.) Plaintiffs also assert that
 16 a "reasonable person would not consider nylon 'natural'." (FAC, ¶ 7 (pg. 6).)

17 Plaintiffs allege that the labeling of the Product from 2012 to 2015 was
 18 deceptive. (FAC, ¶ 13.) Plaintiffs state that they "determined that the Natural
 19 Fibers component of the Product contained ground-up nylon from 2012 to 2015."
 20 (*Id.*) However, they do not allege when or how they determined this.

21 **V.** 22 **ARGUMENT**

23 **A. Legal Standard On Motion To Dismiss**

24 To survive a motion to dismiss under Rule 12(b)(1) and 12(b)(6), a complaint
 25 must "contain sufficient factual matter, accepted as true, to state a claim to relief that
 26 is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009) (internal quotes
 27

28 ¹ Beginning at page 5, the FAC's paragraph numbering restarts at 1.

omitted). The factual allegations must "raise a right to relief above the speculative level" and "some threshold of plausibility must be crossed at the outset" before a case can proceed. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 558 (2007). While "[t]he plausibility standard is not akin to a probability requirement...it asks for more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678 (internal quotations omitted).

For the reasons that follow, Plaintiffs cannot meet the relevant pleading standard for certain claims and accordingly, those claims should be dismissed.

B. Plaintiffs Cannot State A Claim Under Magnuson-Moss (Claim 1)

Liability under the Magnuson-Moss Warranty Act requires there to be a breach of a written warranty. 15 U.S.C. § 2301 et seq. The MMWA "narrowly defines" the term "written warranty" as either (a) a written affirmation of fact that "affirms or promises that such material or workmanship is defect free or will meet a specified level of performance over a specified period of time"; or (b) a written promise "to refund, repair, replace, or take other remedial action with respect to such product" should it not meet specifications. 15 U.S.C. § 2301(6); *Hairston v. South Beach Bev. Co.*, 2012 U.S. Dist. LEXIS 74279, *17-20 (C.D. Cal. May 18, 2012) (dismissing MMWA claim with prejudice).

The Product's label does not promise that the mascara is "defect free or will meet a specified level of performance over a specified period of time." (FAC, ¶ 8 (images).) The Product's label does not promise to "refund, repair, replace, or take other remedial action" if the mascara does not meet specifications. (*Id.*) Therefore, it does not meet the definitions of "written warranty" provided by the MMWA.

Plaintiffs may argue that the Product label's statement that it contains "natural fibers" is a written warranty, but that argument is not supported by law. The Ninth Circuit treats such statements as "product descriptions" rather than promises that the product is "defect free" or guaranteeing a level of performance. *Hairston*, 2012 U.S. Dist. LEXIS at *18-19 (analyzing the product label, "all natural with vitamins");

1 *Astiana v. Dreyer's Grand Ice Cream, Inc.*, 2012 U.S. Dist. LEXIS 101371, *9-11
 2 (N.D. Cal. July 20, 2012) (dismissing MMWA claim based on labels "All Natural
 3 Flavors" and "All Natural Ice Cream" with prejudice; "Plaintiffs do not cite any
 4 authority to support their position that food that contains artificial and/or synthetic
 5 ingredients is defective. Nor could the Court find any cases holding such."); *Brazil*
 6 *v. Dole Food Co.*, 935 F.Supp.2d 947, 966 (N.D. Cal. 2013) (dismissing MMWA
 7 claim with prejudice).

8 Accordingly, this claim must be dismissed with prejudice.

9 **C. Plaintiffs Cannot State Claims For Breach Of Implied Warranties**
 10 **Under Any State's Laws (Claims 7, 11, 14, 17, 18)**

11 1. **Plaintiffs' Breach of Implied Warranty of Merchantability**
 12 **Claims Fail (Claims 7, 11, 14, 17)**

13 Plaintiffs allege claims for breach of the implied warranty of merchantability
 14 under the laws of Florida, Ohio, and Tennessee. (*See* Claims 7, 11 and 14.)
 15 Plaintiffs also impliedly allege a breach of the implied warranty of merchantability
 16 under California law (*see* Claim 17, asserting such a breach under the "laws of other
 17 states"). These claims fail for the following reasons.

18 To state a claim under these states' laws, Plaintiffs must show that the Product
 19 "did not possess even the most basic degree of fitness for ordinary use." Cal. Com.
 20 Code § 2314; Fla. U.C.C. § 672.314; O.R.C. § 1302.27; Tenn. C. § 47-2-314; *Mocek*
 21 *v. Alfa Leisure, Inc.*, 114 Cal.App.4th 402, 406 (2003); *Crawford v. Gold Kist, Inc.*,
 22 614 F.Supp. 682, 688 (M.D. Fla. 1985) ("The fact that Coker 747 is a late maturity
 23 variety of wheat seed not recommended for planting in Florida does not support a
 24 conclusion that Coker 747 is not fit for the ordinary purpose of raising wheat.");
 25 *Savett v. Whirlpool Corp.*, 2012 U.S. Dist. LEXIS 124086, *31-33 (Aug. 31, 2012)
 26 ("Under Ohio law, an implied warranty of merchantability requires that goods be fit
 27 for the ordinary purposes for which such goods are used. [...] Plaintiff does not
 28 allege that the washing machine fails to wash and clean his clothes. Rather, he
 simply alleges that to do so requires more energy and, therefore, additional costs.

1 This allegation is insufficient to state a claim ..."); *Harwell v. Am. Med. Sys., Inc.*,
 2 803 F.Supp. 1287, 1302 (M.D. Tenn. 1992) (affirming summary judgment; "the
 3 issue is whether the product was fit for the ordinary purpose for which such products
 4 are used").

5 Courts in the Ninth Circuit regularly dismiss breach of the implied warranty
 6 claims when plaintiffs have alleged that products are falsely advertised or otherwise
 7 misleading, but fail to also allege that the products were not usable for their ordinary
 8 purpose. *Birdsong v. Apple, Inc.*, 590 F.3d 955, 958 (9th Cir. 2009) (affirming
 9 dismissal of claim; "The plaintiffs admit that the iPod has an 'ordinary purpose of
 10 listening to music,' and nothing they allege suggests iPods are unsafe for that use or
 11 defective"); *In re 5-Hour Energy Mktg. & Sales Practices Litig.*, 2014 U.S. Dist.
 12 LEXIS 149732, *53-54 (C.D. Cal. Sept. 4, 2014) (dismissing California law-based
 13 claim because the complaint did not state that the energy drink was unfit for
 14 consumption); *Viggiano v. Hansen Natural Corp.*, 944 F.Supp.2d 877, 896 (C.D.
 15 Cal. 2013) (dismissing claim where plaintiff did not allege that diet soda was not
 16 suitable for use as a diet soda).

17 Plaintiffs attempt to meet their pleading burden by alleging that the purpose
 18 of the Product "is to allow the consumer to avoid being exposed to synthetic
 19 ingredients." (FAC, ¶¶ 108, 137, 161, 187 (a "reasonable consumer ... would not
 20 accept the Defendant's Product if they knew that they [*sic*] actually contained
 21 synthetic ingredients...").)

22 These allegations are belied by the Product's packaging. Regardless of the
 23 make-up of the Product's fibers, the Product's packaging (which Plaintiffs admit was
 24 important to them) plainly states that the transplanting gel (which must be applied
 25 before the fibers) contains nylon. (FAC, ¶ 8 (second image).) Each of the Plaintiffs
 26 admits that she believed nylon to be a synthetic compound. (FAC, ¶¶ 26, 30, 34,
 27 38.) And, Plaintiffs admit that a "reasonable person would not consider nylon
 28

1 'natural'." (FAC, ¶ 7 (pg. 6).) Accepting these allegations as true, it is not plausible
2 that Plaintiffs or consumers would view the Product entirely as a "natural" product.

3 Therefore, the proper inquiry is not whether the Product is "fit" for its
4 "ordinary purpose as a natural product" (FAC, ¶ 109), but instead, whether the
5 product is fit for its ordinary use as a mascara (FAC, ¶ 185, "Defendant is in the
6 business of manufacturing, distributing, marketing, and advertising eyelash
7 mascara.".) Plaintiffs have not alleged any facts demonstrating that the Product is
8 not usable as a mascara. Accordingly, Claims 7, 11, 14, and 17 should be dismissed
9 with prejudice.

10 2. Plaintiffs' Breach of Implied Warranty of Fitness For a
11 Particular Purpose Claim (Claim 18) Similarly Fails

12 Claim 18 broadly alleges violations of all states' implied warranty of fitness
13 for a particular purpose laws. California, Florida, Ohio, and Tennessee each permit
14 claims on this ground (where properly pleaded, of course). Cal. Com. Code § 2315;
15 Fla. U.C.C. § 672.315; O.R.C. § 1302.28; Tenn. C. § 47-2-315.

16 To state a claim for breach of the implied warranty of fitness for a particular
17 purpose, Plaintiffs must allege a "particular purpose" that they had for the Product.
18 *Mathison v. Bumbo*, 2008 U.S. Dist. LEXIS 108511, *27-28 (C.D. Cal. Aug. 18,
19 2008) (applying California law; dismissing claim for failure to allege a particular
20 purpose; "There is nothing 'peculiar' about using a baby seat to 'secure infants and
21 toddlers.'"); *Royal Typewriter Co., Div. of Litton Business Sys., Inc. v. Xerographic*
22 *Supplies Corp.*, 719 F.2d 1092, 1100 (11th Cir. 1983) (applying Florida law;
23 because copiers were sold for reasons consistent with their ordinary purpose, "a
24 warranty of fitness for a particular purpose did not arise"); *Leen v. Wright Med.*
25 *Tech., Inc.*, 2015 U.S. Dist. LEXIS 125317, *6-9 (S.D. Ohio Sept. 18, 2015)
26 (applying Ohio law; dismissing claim for failure to identify a particular purpose,
27 outside of the ordinary and intended use); *Foley v. Dayton Bank & Trust*, 696
28 S.W.2d 356, 359 (Tenn. Ct. App. 1985) (applying Tennessee law; affirming

1 dismissal of complaint; finding that purchasing a truck for the purpose of leasing it
2 for long distance hauling was consistent with the general purpose of purchasing a
3 truck, and therefore plaintiff failed to show a "particular purpose").

4 A particular purpose,

5 "differs from the ordinary purpose for which the goods are
6 used in that it envisages a specific use by the buyer which
7 is peculiar to the nature of his business [...] For example,
8 shoes are generally used for the purpose of walking upon
9 ordinary ground, but a seller may know that a particular
pair was selected to be used for climbing mountains."

10 *Mathison*, 2008 U.S. Dist. LEXIS at *28-29 (citing Cal. Com. Code § 2315, cmt. 2).

11 Plaintiffs assert that "[t]he particular purpose for which the Products were
12 used was to allow the consumer to avoid *being exposed to synthetic ingredients*."

13 (FAC, ¶ 195 (emphasis added).) This allegation is implausible and cannot be
14 credited: the Product plainly states that it contains nylon in its transplanting gel.
15 (FAC, ¶ 8). Plaintiffs admit that they believe nylon is synthetic (FAC, ¶¶ 26, 30, 34,
16 38), and Plaintiffs admit that a "reasonable person would not consider nylon
17 'natural'" (FAC, ¶ 7 (pg. 6)).

18 Plaintiffs do not allege any other particular purpose for purchasing the
19 Product. Rather, it is plain that Plaintiffs purchased the Product – a mascara – for its
20 ordinary purpose of enhancing the appearance of their eyelashes. (FAC, ¶¶ 3, 185.)
21 There is no allegation that they tried, but could not, use the product. Consequently,
22 Plaintiffs have failed to state a claim for breach of the implied warranty of fitness
23 for a particular purpose and the claim should be dismissed with prejudice.

24 **D. Plaintiffs Are Not Entitled To Equitable Relief, So**
25 **Cannot State A Claim Under The UCL (Claim 2)**

26 "[I]t is axiomatic that a court should determine the adequacy of a remedy in
27 law before resorting to equitable relief." *Franklin v. Gwinnett Cty. Pub. Sch.*, 503
28 U.S. 60, 75-76 (1992); accord, *Mort v. United States*, 86 F.3d 890, 892 (9th Cir.

1 1996). Consequently "a plaintiff seeking equitable relief in California must
2 establish that there is no adequate remedy at law available." *Munning v. Gap, Inc.*,
3 238 F.Supp.3d 1195, 1203 (N.D. Cal. 2017) (internal citations omitted). "Indeed,
4 several courts in this district have barred claims for equitable relief – including
5 claims for violations of California consumer protection statutes – at the motion to
6 dismiss stage where plaintiffs have alleged other claims presenting an adequate
7 remedy at law." *Id.* (collecting cases). In so ruling, "[i]t matters not that a plaintiff
8 may have no remedy if her other claims fail." *Id.* (citing *Rhynes v. Stryker Corp.*,
9 2011 U.S. Dist. LEXIS 58286, *10 (N.D. Cal. May 31, 2011) ("Where the claims
10 pleaded by a plaintiff may entitle her to an adequate remedy at law, equitable relief
11 is unavailable.")).

12 Plaintiffs have alleged a violation of California's UCL; however, the UCL
13 only provides a claimant with equitable relief. *Korea Supply Co. v. Lockheed*
14 *Martin Corp.*, 29 Cal.4th 1134, 1144 (2003) ("A UCL action is equitable in nature;
15 damages cannot be recovered."). At the same time, and inconsistently, Plaintiffs
16 also pray for monetary damages. (FAC, Prayer, p. 38.)

17 All of Plaintiffs' claims are based on the same alleged "natural fibers
18 misrepresentations." The only injury that Plaintiffs allege throughout the FAC is
19 that they "lost money as a result of Defendant's improper conduct." (FAC, ¶¶ 27,
20 31, 35, 39.) Plaintiffs nowhere allege that their other 17 claims do not accord them
21 an adequate remedy at law. In consequence, the UCL claim should be dismissed
22 with prejudice. *Accord, Gomez v. Jelly Belly Candy Co.*, 2017 U.S. Dist. LEXIS
23 134188, *3-4 (C.D. Cal. Aug. 18, 2017) (dismissing UCL claim with prejudice).

24 **E. Plaintiffs Lack Standing To Bring Claims Under**
25 **Other States' Laws (Claims 15, 16, 17, and 18)**

26 Standing is a "necessary element of federal-court jurisdiction under Article
27 III" and a "threshold question in every federal case." *Thomas v. Mundell*, 572 F.3d
28

1 756, 760 (9th Cir. 2009). A court "must be sure of its own jurisdiction before
2 getting to the merits." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 831 (1999).

3 Class action plaintiffs "must allege that they were injured in a particular state
4 in order to bring claims under that state's laws." *United Food & Commer. Workers*
5 *Local 1776 & Participating Employers Health & Welfare Fund v. Teikoku Pharma*
6 *USA, Inc.*, 74 F.Supp.3d 1052, 1078-79 (N.D. Cal. 2014) (citing nine other Ninth
7 Circuit district court cases finding same and based thereon, finding it could address
8 standing at the motion to dismiss phase; dismissing claims arising under 20 states'
9 laws which plaintiffs had no connection to). When "a representative plaintiff is
10 lacking for a particular state, all claims based on that state's laws are subject to
11 dismissal." *In re Flash Memory Antitrust Litig.*, 643 F.Supp.2d 1133, 1164 (N.D.
12 Cal. 2009) (dismissing claims arising under laws of states for which there was no
13 representative plaintiff); accord, *Mollicone v. Universal Handicraft, Inc.*, 2017 U.S.
14 Dist. LEXIS 14125, *26-29 (C.D. Cal. Jan. 30, 2017) (finding same and dismissing
15 all claims arising under other states' laws except for laws of plaintiff's home state
16 and state where she purchased the product).

17 Under Claim 15, the four Plaintiffs allege claims under a laundry list of other
18 states' consumer protection statutes. Plaintiffs do not assert claims under California,
19 Florida, Ohio, or Tennessee law. Plaintiffs lack standing to bring claims under the
20 other states' laws, and consequently, Claim 15 should be dismissed with prejudice.

21 Under Claim 16, Plaintiffs allege breaches of the express warranty laws of
22 other states. Plaintiffs allege breaches of California, Florida, Ohio, and Tennessee
23 law here, but elsewhere in the FAC Plaintiffs allege those same breaches (*see*
24 Claims 4, 6, 10, and 13), rendering their re-allegation under Claim 16 duplicative.
25 Plaintiffs again lack standing to bring claims under other states' laws, and thus
26 Claim 16 should be dismissed with prejudice.

27 Under Claim 17, Plaintiffs allege breaches of the implied warranty of
28 merchantability laws of other states. Defendant addressed alleged breaches of same

1 under California, Florida, Ohio, and Tennessee law, *supra*, showing that Plaintiffs
2 cannot obtain relief under the laws of their representative states. As to any other
3 state, Plaintiffs lack standing, and thus Claim 17 should be dismissed with prejudice.

4 Under Claim 18, Plaintiffs allege breaches of the implied warranty of fitness
5 for a particular purpose under the laws of all states. Defendant addressed alleged
6 breaches of same under California, Florida, Ohio, and Tennessee law, *supra*,
7 showing that Plaintiffs cannot obtain relief under the laws of their representative
8 states. As to any other state, Plaintiffs lack standing, and thus Claim 18 should be
9 dismissed with prejudice.

10 **F. The FAC Lacks Certain Notice Allegations, Requiring**
11 **Dismissal Of The Associated Claims (Claims 6, 8, 18)**

12 1. Florida Requires Notice Before Asserting Breach of Warranty Claims

13 To properly plead claims for breach of express or implied warranties under
14 Florida law, the complaint must include allegations that the plaintiff provided notice
15 of the breach to the seller. *Dunham-Bush, Inc. v. Thermo-Air Service, Inc.*, 351 So.
16 2d 351, 353 (Fla. Dist. Ct. App. 1977) (dismissing complaint for failure to include
17 all required pleading elements, such as notice).

18 Plaintiff Reilly alleged breaches of Florida's express warranty law (Claim 6)
19 and of Florida's implied warranty law (Claim 18). In conjunction with these claims,
20 however, she does *not* allege that she gave the statutorily required notice. This is
21 grounds for dismissal of both claims. *Id.*

22 2. Plaintiffs Cannot Bring A Class Action Claim
23 Under Ohio's Consumer Sales Practices Act

24 Plaintiffs bringing class actions under Ohio's Consumer Sales Practices Act
25 (O.R.C. § 1345 et seq; "OCSPA"), are subject to the statute's class action notice
26 requirement. *In re Porsche Cars N. Am., Inc. Plastic Coolant Tubes Prods. Liab.*
27 *Litig.*, 880 F.Supp.2d 801, 868 (S.D. Ohio 2012) (dismissing claim for failure to
28 meet the notice requirement). Under the OCSPA, "consumers may seek relief in a

1 class action *only* if the defendant was sufficiently on notice that its conduct was
2 deceptive or unconscionable under the statute at the time it committed the alleged
3 acts." *Id.* (emphasis added); O.R.C. § 1345.09(B). Plaintiffs bringing claims on
4 behalf of a class must demonstrate that either (1) the alleged violation is an act that
5 was declared to be deceptive by a rule adopted by the Attorney General before the
6 consumer transaction on which the action is based; or (2) the alleged violation is an
7 act that was determined by a court to violate the OCSA, and the court's decision
8 was available for inspection before the transaction took place. O.R.C. § 1345.09(B).
9 The class action complaint must identify the rule or case that satisfies Section
10 1345.09(B)'s notice requirement. *In re Porsche*, 880 F.Supp.2d at 868.

11 While the FAC asserts a class action claim under the OCSA (Claim 8),
12 Plaintiff Brun does not allege that she complied with Section 1345.09(B)'s notice
13 requirement or identify the rule or case that was allegedly violated. Accordingly,
14 the claim must be dismissed.

15 **VI.** 16 **CONCLUSION**

17 Based on the foregoing, Defendant respectfully requests that the Court grant
18 its motion to dismiss. Defendant particularly requests that the Court dismiss the
19 following claims with prejudice: Claim 1 (MMWA); Claim 2 (UCL); Claim 7
20 (Florida implied warranty of merchantability); Claim 11 (Ohio implied warranty of
21 merchantability); Claim 14 (Tennessee implied warranty of merchantability); and
22 Claims 15-18 (claims under other states' laws (consumer protection statutes; express
23 and implied warranties), duplicative claims (implied warranty of merchantability),
24
25
26
27
28

1 and other claims which Plaintiffs cannot plausibly allege (implied warranty of
2 fitness for a particular purpose).

3
4 Dated: November 3, 2017

5 SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

6
7 By

/s/ Sascha Henry

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10 Attorneys for Defendant Younique, LLC
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